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Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 759.

SCHOOL COMMITTEE OF THE CITY OF BOSTON,
Appellant,

v.

BOARD OF EDUCATION ET AL.,
Appellees.

MOTION TO DISMISS.

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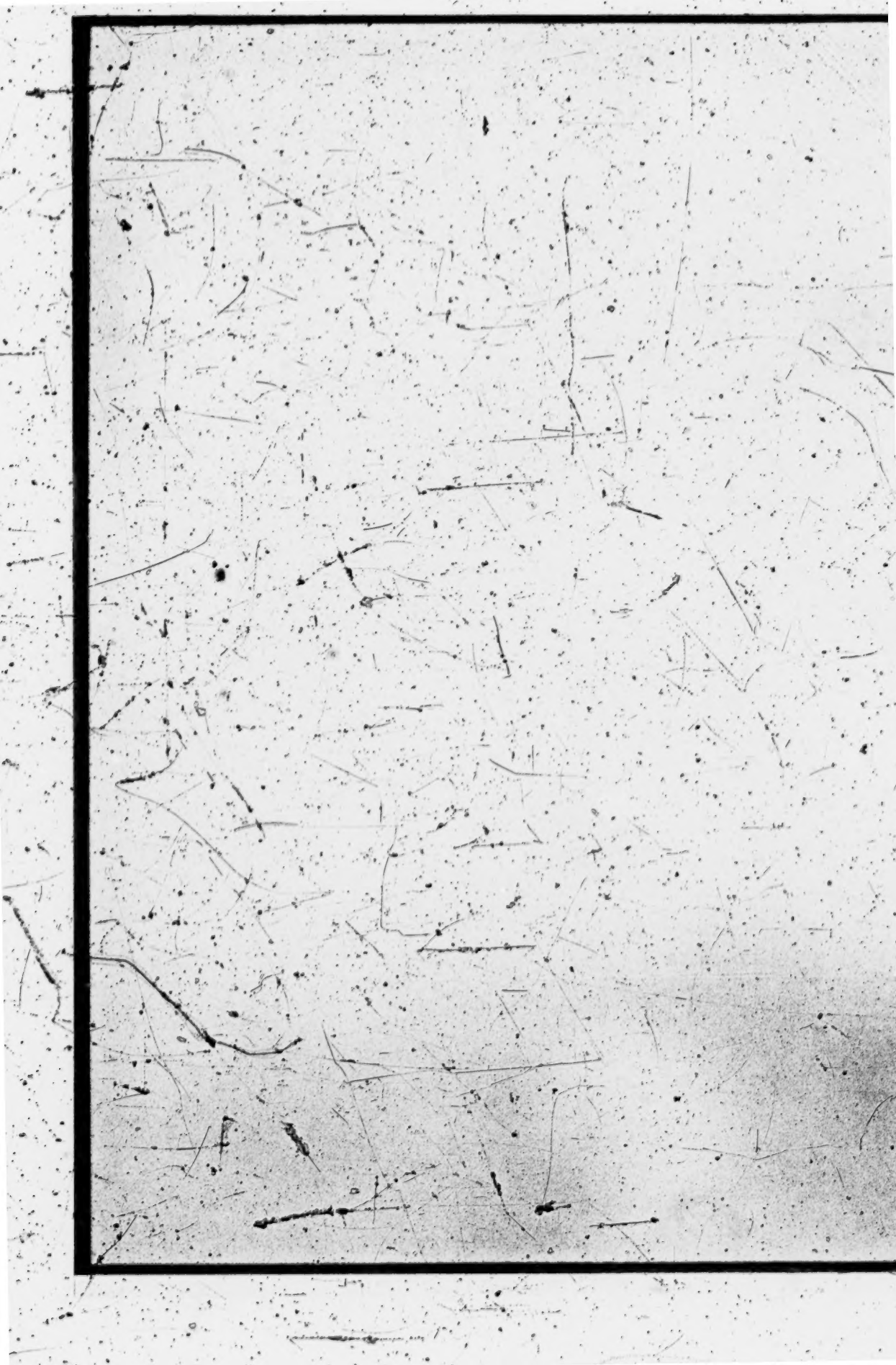

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MOTION TO DISMISS.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, hereby move that the appeal of appellant be dismissed for the reasons hereinafter set forth.

Statement of Case.

This is an appeal from an order of the Massachusetts Supreme Judicial Court declaring that the Massachusetts Racial Imbalance Statute, St. 1965, c. 641, is not in violation of the Fourteenth Amendment of the Constitution of the United States. The opinion of the Massachusetts Supreme Judicial Court and the Racial Imbalance Statute are reprinted in the Appellant's Jurisdictional Statement (herein cited as "Jur. St.").

The litigation was commenced by a petition for declaratory judgment, brought by the appellant (School Committee of the City of Boston) against the members of the Massachusetts State Board of Education and the Massachusetts Commissioner of Education in the Massachusetts Superior Court for Suffolk County (R. I, 13). The Superior Court reserved and reported the case without decision to the Massachusetts Supreme Judicial Court upon the pleadings, evidence and findings of fact, such decree to be entered as justice and equity may require (R. I, 1, 12-21).

The Racial Imbalance Statute may be summarized as follows: It provides that the School Committee of each city, town and district shall annually conduct a "racial census," and submit to the State Board of Education statistics "sufficient to enable a determination to be made of the per cent of nonwhite pupils in all public schools and in each school under the jurisdiction of each such committee" (G.L. c. 71, § 37D, as inserted by St. 1965, c. 641, § 1). If the State Board finds that racial imbalance exists in one or more of the public schools in a municipality or a district, it shall notify the appropriate School Committee that such a finding has been made. Racial imbalance is defined in terms of a comparison between the nonwhite students in a school with their ratio in the general community. This definition is to be read with the next sentence, which provides that a school is racially imbalanced when there are more than 50 per cent nonwhite in the student body.[1]

[1] In rejecting appellant's contention, not now in issue, that the term "racial imbalance" was uncertain in definition, the Massachusetts Supreme Judicial Court held that the 50 per cent definition would be given effect and that it was "a proper occasion for application of the principle that a statute should be construed, wherever possible, to avoid doubts as to constitutionality" (Jur. St. 23).

Argument.

I. Most of the Questions Raised Depend on Facts Not Proved by Appellant and Contrary to the Findings of the Massachusetts Supreme Judicial Court.

The appellant has failed to prove any infringement of any particular person's rights in violation of the Fourteenth Amendment. Certainly the constitutional rights of the individual members of the Boston School Committee have not been infringed. It was only allowed to raise the constitutional issues by the Massachusetts Supreme Judicial Court because the Court, in the exercise of its discretion, was of the opinion ". . . that in this declaratory proceeding involving questions of pressing public importance we should indicate our views where a vista of avoidable litigation among administrative officials is disclosed and the issues have been fully argued" (Jur. St. 22).

Indeed the Massachusetts Supreme Judicial Court expressly found:

> "Until a pupil has been in fact excluded from a public school on account of race, we are unimpressed with the argument that the act works a denial of equal protection." (Jur. St. 26.)

The superficially serious questions raised on which there might be a difference of legal opinion as to result are based on prophesies and speculation rather than on the findings of the Massachusetts Court. Included in these contentions are that the Racial Imbalance Statute establishes an exclusionary color quota which may require exclusion of a child simply because of his color, and that ultimate compliance with the statute can be accomplished only by an exchange of students between balanced and imbalanced schools, requir-

ing different treatment of students similarly situated solely because of their color.

The opinion of the Massachusetts Supreme Judicial Court appropriately characterizes and disposes of these contentions by the following statement:

> "Some complaints are baleful predictions as to the effect of the act which are confidently asserted before precise results are known and before any individual or group has had the law unconstitutionally applied to them. We decline to follow the invitation to look ahead 'twenty-five or fifty years from now' and by guesswork as of that time to discover 'devastating implications.' Still other objections are speculative prophesies and little more than expressions born of the hope that the statute will fail." (Jur. St. 24-25.)

Judicial determination of these questions must necessarily rest on a factual basis which is not present in this case. It would seem far better for this Court not to consider such serious allegations on the basis of prognostications.

II. Even if the Standard of "Nonwhite" is Too Vague a Standard for Application by Administrative Officials, No Federal Question is Raised.

Pursuant to the Racial Imbalance Statute the determination that racial imbalance exists is to be made by the State Board of Education (G.L. c. 71, § 37D; Jur. St. 28). The basis for making the determination necessitates counting "nonwhite" students. There is precedent for the Massachusetts court's conclusion that this standard is reasonably capable of application by administrative officials. *School Committee of New Bedford* v. *Commissioner of Education*, 349 Mass. 410, 415-416; see *United States* v. *Thind*, 261 U.S.

204, 206-215. However, it is not necessary for purposes of this motion to consider the correctness of the decision, because, even if the standard is vague, it raises no federal question.

The alleged vague standard in this case does not create a situation where individuals may unwittingly subject themselves to criminal or civil liability because they are unable to discover from the terms of the statute whether or not particular conduct is forbidden. It raises at most the question whether the standard is of sufficient clarity so that the State Board of Education may appropriately work out the details and implementation of the legislation, avoiding a successful challenge *under state law* that the Massachusetts Legislature has improperly delegated its legislative power to the State Board of Education. (See, *e.g., Opinion of the Justices,* 334 Mass. 721, 743, and case cited therein.)

Whether the Massachusetts Legislature has properly delegated its authority is plainly a question to be answered with reference to Massachusetts state law. Appellees know of no authority that the Due Process Clause of the Fourteenth Amendment requires that a state legislature clearly delineate its delegation of authority to public officials charged with administering a particular law. This court should therefore decline to exercise jurisdiction with respect to this question, as it raises no federal question.

III. The Massachusetts Supreme Judicial Court did Not Expressly Pass on the Question of Whether the Racial Imbalance Statute is Unequal in its Application to Underprivileged Persons, nor does This Raise a Substantial Federal Question.

Appellant contends that the act is discriminatory, in violation of the equal protection clause of the Fourteenth

Amendment, because it is unreasonably preferential and unequal in its application to the underprivileged groups in our society whose educational patterns are as abnormal as those of nonwhites. The opinion of the Massachusetts Court does not indicate that this question was expressly passed on. Therefore this question cannot properly be brought before this court.

Moreover, no substantial federal question is raised, since this is simply an attempt to attack the wisdom of the statute. "In resolving the issue of constitutionality it is [not part of the court's function] to assess the wisdom . . . of the particular legislative plan" (Jur. St. 24). A legislature dealing with social evils may recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest. The Legislature may proceed cautiously and, "if the evil is specially experienced in a particular branch of business," it is not necessary that the prohibition "should be couched in all-embracing terms." *Carroll* v. *Greenwich Insurance Co.*, 199 U.S. 401, 411. Simply because there are other instances to which the law might apply is no reason to raise constitutional doubt as to its validity. *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U.S. 224, 227. *Miller* v. *Wilson*, 236 U.S. 373, 384. Therefore, even if the question is properly before this court, it raises no substantial federal question.

IV. Recognition of Race to Create Equal Educational Opportunities is Manifestly Constitutionally Permissive.

The holding of the Massachusetts court that recognition of race for educational purposes is permitted is so manifestly correct that no substantial federal question is raised. The precise issue before the Massachusetts Supreme Ju-

dicial Court was not whether the Fourteenth Amendment requires state authorities, including the state Legislature, to take action aimed at correcting racial imbalance in its schools, but whether the Fourteenth Amendment permits such authorities to take such action.

With the exception of the Illinois Supreme Court (*Tometz* v. *Board of Education, Waukegan City School District,* —N.E. 2d—(unreported because petition for rehearing allowed, Jur. St. 9), no court that has considered this question has had any difficulty in concluding that it is within the power of a state to take such corrective action. These cases are collected in 11 A.L.R. 3d 782, and Racial Isolation in Public School, U.S. Government Printing Office (1967), pp. 234-236.

The permissible basis for such corrective action is probably best expressed by the court in the case of *Springfield School Committee* v. *Barksdale,* 348 F. 2d 261 (1st Cir. 1965), where the court said at page 266:

> "It has been suggested that classification by race is unlawful regardless of the worthiness of the objective. We do not agree. The defendants' proposed action does not concern race except insofar as race correlates with proven deprivation of educational opportunity. . . . It would seem no more unconstitutional to take into account plaintiffs' special characteristics and circumstances that have been found to be occasioned by their color than it would be to give special attention to physiological, psychological or sociological variances from the norm occasioned by other factors. That these differences happen to be associated with a particular race is no reason for ignoring them."

Recognition of race necessarily depends on the purpose of the legislation. In this case that purpose is equal edu-

cational opportunity designed to bring Negroes into the mainstream of American life in furtherance of the principles of the Equal Protection Clause of the Fourteenth Amendment. Appellant's reliance on the case of *McLaughlin* v. *Florida*, 379 U.S. 184, 194, is unwarranted. That case suggests that a state must prove an overriding statutory purpose requiring racial classification rather than merely showing that classification is rationally related to the accomplishment of a permissible state policy. One might reasonably question whether that principle merely establishes a rule of evidence rather than a federal constitutional standard, but under any circumstances that case does not raise any doubts as to the validity of the Massachusetts Supreme Judicial Court decision.

The facts of *McLaughlin*, dealing with a discriminatory statute making interracial cohabitation a crime, are of course extremely remote from any educational subject matter. But a more important distinction is that in *McLaughlin* the state statute was enacted and applied with the purpose of discriminating against Negroes. The purpose of the racial imbalance statute is to aid Negroes in achieving equal educational opportunities. Appropriately Mr. Justice Frankfurter, in the case of *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 98, stated: "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." With even stronger language the Massachusetts Court in this case stated:

> "It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment." (Jur. St. 23.)

Lastly, even if *McLaughlin* establishes a constitutional standard and even if that standard is applicable to the facts of this case, the burden of the Commonwealth of Massachusetts would be met because the Racial Imbalance Statute concerns race only "insofar as race correlates with *proven* deprivation of educational opportunity." *Springfield School Committee* v. *Barksdale, supra,* 266. (Emphasis supplied.)

Whether it is permissible for the Massachusetts Legislature to recognize race in enacting the Racial Imbalance Statute is the only question of public importance raised by the appellant that is not based on facts or speculation. The only authority answering this question in the negative is the Supreme Court of Illinois in a decision presently being reconsidered. That decision would command government to sit and watch Negroes flounder in a quagmire of oppressive unequal educational opportunity. It is beyond reason that the Fourteenth Amendment of the Constitution would require such a result. It is therefore submitted on the basis of persuasive precedent that appellant's appeal should be dismissed for failure to raise a substantial federal question.

Conclusion.

For the foregoing reasons it is respectfully submitted that the appeal of appellant be dismissed.

Respectfully submitted,

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